

Before the
Administrative Hearing Commission
State of Missouri



MISSOURI STATE BOARD OF NURSING,)	
)	
Petitioner,)	
)	
vs.)	No. 13-0338 BN
)	
TASHA KING,)	
)	
Respondent.)	

DECISION

Tasha King's registered professional nurse's license is subject to discipline because she unlawfully possessed a controlled substance, violated drug laws of this state, and violated professional trust and confidence.

Procedure

The State Board of Nursing filed a complaint on February 19, 2013, seeking to discipline Ms. King's nursing license. Ms. King filed her answer on April 8, 2013.

We held a hearing on September 24, 2013. Ian Hauptli represented the Board. Ms. King appeared and represented herself. This case became ready for decision on November 12, 2013, when the time expired for Ms. King to file her written argument.

Findings of Fact

1. Tasha King is licensed by the Missouri State Board of Nursing as a registered professional nurse, and has been at all times relevant to this case.
2. In March 2012, Ms. King was employed as a registered nurse by Community Blood Center in Kansas City, Missouri.
3. On March 20, 2012, Ms. King was selected by her employer to submit a urine sample for a random drug screening.
4. The sample Ms. King submitted tested positive for oxycodone.
5. Ms. King did not have a prescription for oxycodone at the time of the random drug screen.
6. Ms. King did have prescriptions for hydrocodone, Imitrex, and Zofran at the time of the random drug screen. The night before the random drug screen, she experienced a migraine and took Imitrex, then later took hydrocodone and Zofran.
7. Oxycodone (for which Ms. King tested positive) and hydrocodone (for which she had a prescription) are two different drugs.
8. Because of the positive drug screen, Ms. King was terminated from her employment for violation of Community Blood Center's drug policy. Community Blood Center then filed a complaint with the Missouri Division of Professional Registration regarding Ms. King's positive drug screen and termination.

Conclusions of Law

We have jurisdiction. §§ 335.066.2 and 621.045, RSMo.¹

The Board bears the burden of proving, by a preponderance of evidence, that grounds exist to discipline Ms. King's license. *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000). A preponderance of the evidence is evidence showing, as a whole, that "the fact to be proved [is] more probable than not." *Id.* This Commission judges witness credibility and may believe all, part, or none of the testimony of any witness. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App. W.D. 1992).

Here the Board alleges cause for discipline exists under § 335.066.2(1), (12), and (14):

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:

(1) Use or unlawful possession of any controlled substance, as defined in chapter 195, or alcoholic beverage to an extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096;

(12) Violation of any professional trust or confidence;

(14) Violation of the drug laws or rules and regulations of this state, any other state or the federal government[.]

We agree with the Board.

¹ References to "RSMo" are to the Revised Statutes of Missouri (Supp. 2012), unless otherwise noted.

Cause for discipline exists under §§ 335.066.2(1) and (14)

Section 335.066.2(1) provides cause for discipline when a nurse uses or unlawfully possesses a controlled substance as defined under Chapter 195, RSMo. Similarly, § 335.066.2(14) provides for cause when a licensee violates Missouri drugs laws.

One such Missouri drug law, § 195.202.1, provides:

Except as authorized by section 195.005 to 195.425, it is unlawful for any person to possess or have under his control a controlled substance.

There is a lawful-possession exception to § 195.202.1. As relevant here, § 195.180, RSMo (2000), provides that a person may lawfully possess a controlled substance if she has obtained it upon valid prescription or order of a practitioner.

Section 324.041, applicable by its plain language to proceedings such as the instant one, provides that

any licensee...[who] tests positive for a controlled substance, as defined in chapter 195, is presumed to have unlawfully possessed the controlled substance in violation of the drug laws or rules and regulations of this state, any other state, or the federal government unless he or she has a valid prescription for the controlled substance. The burden of proof that the controlled substance was not unlawfully possessed in violation of the drug laws or rules and regulations of this state, any other state, or the federal government is upon the licensee[.] [Emphasis added.]

Ms. King tested positive for oxycodone, which is defined as a controlled substance under Chapter 195, specifically, § 195.017.4(1)(a)n. Because of the positive test, § 324.041 establishes the presumption that she unlawfully possessed it, and shifts the burden of proof to Ms. King to show that she did “not unlawfully possess[.]” the oxycodone “in violation of the drug laws[.]” Section 324.041 excuses a positive test if the licensee has a valid prescription for the controlled substance.

Ms. King did not put on evidence that she had a valid prescription. She denied taking the oxycodone at all and theorized that her other prescriptions created a false positive on the drug test.² She also said that she asked for a repeat drug test twice, once from the lab and once from her employer, and was denied both times.³ She testified that she would never have done anything in violation of her nursing oath.⁴ We conclude she has failed to rebut the presumption of unlawful possession for two reasons. One, we read § 324.041 to permit only one means of rebutting the presumption of unlawful possession: proof of a valid prescription, which Ms. King did not have.

Two, even if § 324.041 could be read to permit a licensee to rebut the presumption by other means, Ms. King failed to do so. As noted above, § 324.041 establishes a presumption of unlawful possession when a “licensee...tests positive.” We do not think it a stretch to construe the statute to establish a presumption of the *validity* of such test result. In other words, the statute tethers presumption of unlawful possession to presumptively valid proof.

Here, Ms. King did not object to the Board’s evidence.⁵ The Board’s Exhibit B is the authenticated Quest Diagnostics lab report reflecting Ms. King’s positive test result, and the Forensic Drug Testing Custody and Control Form, establishing that the sample was Ms. King’s.

The Board’s Exhibit A is a packet of authenticated business records, including the Board’s investigation report of Community Blood Center’s complaint concerning Ms. King.⁶ The report contains information from a Quest physician, Walter Dean. Dr. Dean opined that oxycodone and hydrocodone have different metabolic pathways, and that neither hydrocodone,

² Tr. 8-11, and 13; Petitioner’s Exhibit A, p. 4-1 (Ms. King’s letter to the Board).

³ Tr. 13; Petitioner’s Exhibit A, p. 4-1.

⁴ Tr. 13.

⁵ Tr. 8.

⁶ Petitioner’s Exhibit A, p. 3.

nor the other two drugs Ms. King took, would create a positive result for oxycodone.⁷ Ms. King offered no evidence that her prescriptions could have created a false positive for oxycodone.

We find Ms. King credible. Even so, her denial and her unsupported theory do not outweigh the evidence of the positive test result, the statutory presumption of validity of the test result, and the unobjected-to evidence that the other drugs she took could not have produced a false positive test result. Had the statutory presumption not been in place, or had Ms. King put on evidence in support of her false-positive theory, such as demonstrating that proper testing procedures were not followed or expert testimony otherwise discounting the test result, we may well have reached a different conclusion. But applying the statute as written and in view of the record before us, we must conclude that even if the presumption of unlawful possession can be rebutted by means other than demonstration of a valid prescription, Ms. King still failed to rebut it.

The Board has cause to discipline Ms. King's nursing license under § 335.066.2(1) and (14).

Cause for discipline exists under § 335.06.2(12)

The Board alleges that Ms. King's conduct violated the professional trust or confidence of Ms. King's employer and patients. "Professional" is

of, relating to, or characteristic of a profession or calling...[;]... engaged in one of the learned professions or in an occupation requiring a high level of training and proficiency...[; and]...characterized or conforming to the technical or ethical standards of a profession or an occupation....

WEBSTER'S THIRD NEW INT'L DICTIONARY UNABRIDGED 1811 (1986). "Trust" is "assured reliance on some person or thing [;] a confident dependence on the character, ability, strength, or

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Id.

truth of someone or something...[.]” *Id.* at 2456. “Confidence” is a synonym for “trust.” *Id.* at 475 and 2456. Trust “implies an assured attitude toward another which may rest on blended evidence of experience and more subjective grounds such as knowledge, affection, admiration, respect, or reverence[.]” *Id.* at 2456. Confidence “may indicate a feeling of sureness about another that is based on experience and evidence without strong effect of the subjective[.]” *Id.* In short, professional trust or confidence is the reliance on the special knowledge and skills evidenced by professional licensure.

As noted, we found Ms. King credible. But in view of the statutory presumption, which she failed to rebut, we reluctantly conclude the Board has established a violation of professional trust or confidence, by a preponderance of the evidence. An employer in the health care profession must be able to rely on and trust its professional staff, including its nurses, to strictly observe the drug laws and not to produce a positive test result for an unprescribed, controlled substance during work hours.

The Board has cause to discipline Ms. King’s nursing license under § 335.066.2(12).

Summary

Cause for discipline of Ms. King’s license exists under §§ 335.066.2(1), (12), and (14).

SO ORDERED on December 11, 2013.

\s\ Alana M. Barragán-Scott
ALANA M. BARRAGÁN-SCOTT
Commissioner